

The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LAWRENCE HARTFORD, DOUGLAS MITCHELL; BRETT BASS; SPORTING SYSTEMS VANCOUVER, INC.; SECOND AMENDMENT FOUNDATION, INC.; AND FIREARMS POLICY COALTION, INC..

Plaintiffs,

VS.

BOB FERGUSON, in his official capacity as Washington State Attorney General; et al.

Defendants.

NO. 3:23-cv-05364-RJB

SNOHOMISH COUNTY DEFENDANTS
FORTNEY AND CUMMINGS' MOTION
TO DISMISS PLAINTIFFS' 42 U.S.C. §
1983 AND 42 U.S.C. §1988 CLAIMS AND
DAMAGES

**NOTE ON MOTION CALENDAR:
June 16, 2023**

I. INTRODUCTION AND RELIEF REQUESTED

Defendants Adam Fortney and Jason J. Cummings, by and through their counsel of record, Deputy Prosecuting Attorneys Lyndsey M. Downs and Margaret A. Duncan, respectfully request dismissal, with prejudice, of all claims brought pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1988 in accordance with Fed. R. Civ. P. 12(b)(6). Although the Complaint challenges the constitutionality of Substitute House Bill 1240 (“SHB 1240”), it fails to allege any facts to suggest that Defendants Fortney or Cummings, either personally or through their roles as Snohomish

1 County officials, engaged in a Second Amendment violation. Therefore, the Court should dismiss
 2 all claims for damages and relief under 42 U.S.C. § 1983 and § 1988 against Defendants Fortney
 3 and Cummings.

4 II. STATEMENT OF FACTS

5 Plaintiffs' Complaint alleges that SHB 1240 violates the Second and Fourteenth
 6 Amendments. Dkt. 1. The Complaint further asserts that SHB 1240, signed by Governor Inslee
 7 on April 25, 2023, made it "illegal for any person in Washington to, with a handful of exceptions,
 8 'manufacture, import, distribute, sell, or offer for sale any assault weapon.'" *Id.*, ¶26. The
 9 Complaint alleges that the individual Plaintiffs (Mr. Hartford, Mr. Mitchell, and Mr. Bass) have
 10 a present intention and desire to purchase the type of weapons that are banned by SHB 1240. *Id.*,
 11 ¶¶64, 70, 77. It also alleges that Plaintiff Sporting Systems Vancouver, Inc. has a present intention
 12 and desire to sell the weapons prohibited by SHB 1240. *Id.*, ¶81.
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14 The Complaint identifies Adam Fortney as the Snohomish County Sheriff and Jason
 15 Cummings as the Snohomish County Prosecutor, and the Complaint asserts that they are sued in
 16 their official capacities. *Id.*, ¶¶21, 25. The Complaint alleges no other facts regarding these
 17 defendants or their conduct.
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19 III. AUTHORITY

21 a. Legal Standard

22 The Court must dismiss a complaint as a matter of law pursuant to Fed. R. Civ. P. 12(b)(6)
 23 when it fails "to state a claim upon which relief can be granted." A complaint "must contain a
 24 'short and plain statement of the claim showing that the pleader is entitled to relief.'" *Ashcroft v.*
Iqbal, 556 U.S. 662, 677–78 (2009) (quoting Fed. R. Civ. P. 8(a)(2)). The Court presumes all
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material factual allegations to be true and draws reasonable inferences in favor of the non-moving party when considering a Rule 12(b)(6) motion to dismiss. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). However, the Court is not required to accept as true any conclusory allegations of law, unwarranted deductions of fact, or unreasonable inferences. *Id.*

To state a claim on which relief may be granted, Plaintiffs must go beyond an “unadorned, the-defendant-harmed-me accusation[s],” “labels and conclusions,” and “naked assertions devoid of further factual enhancement.” *Iqbal*, 556 U.S. at 678 (internal citations omitted). While legal conclusions can provide the complaint’s framework, they must be supported by factual allegations. *Id.* at 664. Factual allegations themselves must be enough to demonstrate a plausible right to relief that is “above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Finally, the complaint “must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively” and “must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.” *AE ex rel. Hernandez v. Cnty of Tulare*, 666 F.3d 631, 637 (9th Cir. 2012) (internal quotations omitted).

b. The Court Should Dismiss Plaintiffs’ Claims for Damages and Relief Under 42 U.S.C. §1983 and §1988 Because Plaintiffs Have Failed to State a Claim Upon Which Relief Can Be Granted.

The Court should dismiss with prejudice all 42 U.S.C. § 1983 and § 1988 claims brought against Defendants Fortney and Cummings because Plaintiffs’ Complaint fails to state a valid claim for relief under these statutes. 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law[.]

1 42 U.S.C. § 1983 “is not itself a source of substantive rights,” but rather provides “a method of
 2 vindicating federal rights elsewhere conferred.” *Graham v. Connor*, 490 U.S. 386, 393–94, 109
 3 S.Ct. 1865, 104 L.Ed.2d 443 (1989). 42 U.S.C. § 1988 is the mechanism through which successful
 4 civil rights litigants bringing claims under § 1983 can receive an award of attorney fees. See
 5 *Hensley v. Eckerhart*, 461 U.S. 424, 429, 103 S. Ct. 1933 (1983).

7 To plead a § 1983 claim, a plaintiff must set forth facts in support of the following
 8 elements: (1) the conduct complained of must have been under color of state law, and (2) the
 9 conduct must have subjected the plaintiff to a deprivation of constitutional rights.” *Jones v.*
 10 *Community Redevelopment Agency of Los Angeles*, 733 F.2d 646, 649 (9th Cir. 1984). “A
 11 prerequisite to recovery under the Civil Rights Act, 42 U.S.C. § 1983, is that the plaintiff prove
 12 that the defendants deprived him of a right secured by the Constitution and the laws of the United
 13 States.” *Gomez v. Whitney*, 757 F.2d 1005, 1006 (9th Cir. 1985).

15 Liability can arise under 42 U.S.C. § 1983 with respect to an individual or a government
 16 entity. Liability against an individual defendant under § 1983 can only arise upon a showing that
 17 the defendant personally participated in a constitutional violation. *Taylor v. List*, 880 F.2d 1040,
 18 1045 (9th Cir. 1989). To show personal participation, a plaintiff must allege that a defendant
 19 “does an affirmative act, participates in another’s affirmative acts, or omits to perform an act
 20 which he is legally required to do that causes the deprivation.” *Leer v. Murphy*, 844 F.2d 628, 633
 21 (9th Cir. 1988). A 42 U.S.C. § 1983 claim against a government entity, commonly referred to as
 22 a *Monell* claim, requires a plaintiff to demonstrate that an official policy, custom, or pattern on
 23 the part of the government entity was the actionable cause of a constitutional injury. *Tsao v.*
 24 *Desert Palace, Inc.*, 698 F.3d 1128, 1143 (9th Cir. 2012). A local government may only be held
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liable under §1983 for acts which the government “has officially sanctioned or ordered.” *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123, 108 S. Ct. 915 (1988) (internal quotations omitted). Claims against government officials in their “official capacity” are also *Monell* claims. *See Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 71 (1989); *Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (“[A]n official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.”).

Although the Complaint alleges that Adam Fortney and Jason Cummings are being sued in their official capacities as Snohomish County Sheriff and Snohomish County Prosecutor, the Complaint fails to state any facts that would support a *Monell* claim. The Complaint does not identify any Snohomish County policy, custom, or pattern that was the actionable cause of any alleged constitutional injury suffered by the Plaintiffs. Nor does the Complaint set forth any facts to suggest that Fortney or Cummings engaged in any conduct that deprived Plaintiffs of their rights under the Second and Fourteenth Amendments. The Complaint does not contain any factual allegations relating to Fortney or Cummings, except to state their positions as government officials. Plaintiffs cannot amend their Complaint to fix these deficiencies as they cannot legally hold a county sheriff or prosecutor responsible for the enactment of a state statute. Therefore, the Court should dismiss Plaintiffs’ claims under §§1983 and 1988.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs’ claims for relief and damages under 42 U.S.C. §§1983 and 1988 against Defendants Fortney and Cummings should be dismissed with prejudice.

I certify that this memorandum contains 1,313 words, in compliance with the Local Civil
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Rules.
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DATED this 22nd day of May, 2023.
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Civil Division of the Snohomish County Prosecuting Attorney, and that on May 22, 2023, I caused to be served a true and correct copy of the foregoing document upon the parties listed by the method(s) indicated:

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30 I declare under the penalty of perjury of the laws of the State of Washington that the
31 foregoing is true and correct to the best of my knowledge.

32 DATED this 22nd day of May, 2023.

33
34 s/Nikki Michel
35 Nikki Michel, Legal Assistant

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38 CUMMINGS MOTION TO DISMISS - 8
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